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IN THE HIGH COURT OF CHHATISGARH AT BILASPUR

**Single Bench**

S.A 461 / 06

APPLELLANT

(1) LALJI, S/O BUDHARI, SATNAMI, AGE AROUND 46 YEARS

(2) PUNARAM, S/O BUDHARI, SATNAMI, AGE AROUND 43 YEARS

(3) AARTI BAI, S/O BUDHARI, SATNAMI, AGE AROUND 51 YEARS

(4) BIRIJBAI, WIDOW OF BUDHARI, SATNAM, AGE AROUND 76 YEARS

ALL RESIDENTS OF GRAM CHARNITOLA, TAH-LORMI, DISTT. BILASPUR (C.G.)

{ DEFENDENTS NO. 1 TO 4. }

P.R. No. 3266/06 Bilaspur
Presented by Shri ...
dated ...

V/S

RESPONDENTS

(1) MUS. MARIYUM BAI, WIDOW OF BUDHARI, CASTE SATNAMI, AGE AROUND 86 YEARS, R/O OF GRAM CHARNITOLA, TAH-LORMI, DISTT. BILASPUR (C.G.)

{ PLAINTIFF }

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(2) STATE OF CHHATTISGARH, THROUGH DISTRICT COLLECTOR, BILASPUR(C.G.)

{ DEFENDENT NO. 5 }

**SECOND APPEAL UNDER SECTION 100 OF CIVIL PROCEDURE CODE 1908**

A.F.R.

[redacted]

**HIGH COURT OF CHHATTISGARH AT BILASPUR**

**SECOND APPEAL No. 461 of 2006**

Lalji & others

Vs.

Mus. Mariyam Bai & another

Post for Judgment: 30.11.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

A.F.R.

30.11.06

**HIGH COURT OF CHHATTISGARH BILASPUR**

**SECOND APPEAL No. 461/2006**

**Single Bench : Hon'ble Shri Dilip Raosaheb Deshmukh, J.**

Lalji & others

Versus

Mus. Mariyam Bai & another.

Present : Shri Ali Asgar, learned counsel for the appellants.
Shri Utkarsh Verma, learned counsel for the Respondent No.1/plaintiff.
Shri Akhil Agrawal, Panel Lawyer for the State/Respondent No. 2

**JUDGMENT**

(Delivered on this 30th day of November, 2006)

Being aggrieved by the judgment and decree dated 18.8.2006 by Shri N.K.S. Thakur, Additional District Judge, Mungeli, District Bilaspur in First Appeal No. 5-A/2005 whereby the judgment and decree dated 1.9.2005 passed in Civil Suit No. 89-A/2000 by Smt. Kiran Chaturvedi, Civil Judge, Class-I, Mungeli dismissing the suit was reversed, the defendants/appellants have preferred this Second Appeal.

2. The following facts were not disputed in this appeal. Budhari and Kejaha were brothers. Respondent/plaintiff Mariyam Bai was

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married to Kejaha while the appellant/defendant No. 4 Birij Bai was married to Budhari. Defendants/appellants No. 1 to 3 are the children of Budhari through Birij Bai. After death of Budhari, the disputed agricultural lands in area 5.2 acres situated in village Charnitola, P.H. No. 9, Tahsil Lormi were mutated in the name of appellants/defendants, who were in possession thereof on the date of suit. After death of her husband Kejaha, Mariyam Bai, the respondent/plaintiff had in the year 1985 and 1986 executed a registered sale deed of agricultural lands belonging to Kejaha vide Ex. D-17 and D-18 wherein she was referred to as the widow of Kejaha.

3. The plaintiff/respondent had pleaded that she was the owner and in peaceful possession of the suit lands mentioned in Schedule-A to the plaint situated in Charnitola. In cause title only she referred herself as widow of Budhari. It was also not pleaded as to in what form did she marry Budhari and how she claimed title over the suit lands. It was also not pleaded that she was the legally married wife of Kejaha. On the pleading that the defendants No. 1 to 4 had, in the year 2000, in collusion with the Revenue Officials and Patwari, got their name mutated over the suit lands and forcibly dispossessed her and were openly disclaiming her title thereto she prayed for the relief of declaration of title and possession over the suit lands. Thus it was

not pleaded that in the year 1952, Kejaha had entered into a Churi Marriage with Mariyam Bai and had executed a document on 10.5.1952 vide Ex. P-1 acknowledging the Churi marriage with Mariyam Bai and also the fact that out of the 15 acres of his lands, he had given 5 acres to Mariyam Bai for her maintenance. No details of the lands given to Mariyam Bai were mentioned.

4. The defendants/appellants resisted the claim of the plaintiff/respondent while pleading that Mariyam Bai was the widow of Kejaha and not the wife of Budhari. The appellant/respondent No. 4 Birij Bai was the wife of Budhari. In this manner, Mariyam Bai had absolutely no right or title over the lands owned by Budhari, which after death of Kejaha, were rightly mutated in the name of the defendants who were in continuous possession thereof. Mariyam Bai, being widow of Kejaha, was mutated on the lands belonging to Kejaha and had sold lands in 1985, 1986 vide Ex. D-17 and D-18 as widow of Kejaha. She thus had no right or title over the suit lands.

5. Learned Civil Judge, Class-I, Mungeli dismissed the suit while holding that document Ex. P-1 i.e. *"Churihai bihav aau Kharcha Parmani"* pertaining to the year 1952 was not proved being a suspicious document due to the following reasons:

(a) That in the year 1985 and 1986 Mariyam Bai while selling lands belonging to her husband Kejaha was shown as the widow of Kejaha in the registered sale deed D-17 and D-18.

(b) If the document Ex. P-1 had been executed by Budhari in the year 1952, Mariyam bai had failed to offer any explanation as to why she did not get her name mutated over the suit land till the year 2000.

(c) Mariyam Bai had also failed to proye that she was ever in possession of the suit lands and was dispossessed by the defendants in the year, 2000.

(d) Mariyam Bai had failed to prove that she had any right or title over the suit lands.

6. Being aggrieved by the above judgment and decree, plaintiff Mariyam bai preferred an appeal before the Additional District Judge, Mungeli, Distt. Bilaspur who reversed the judgment and decree passed by the Lower Court and held that the plaintiff had established that Budhari had executed Ex. P-1 in the year 1952 in favour of Mariyam Bai while entering into a Churi form of marriage with her and giving the suit lands to her for her maintenance and the defendants had, after mutation of their names over the suit lands unauthorisedly dispossessed Mariam Bai. On these premises, the First Appellate

Court declared the title of Mariyam Bai over the suit lands mentioned in Schedule-A to the plaint and also awarded the relief of possession of the suit lands to her.

7. This second appeal was admitted on the following substantial question of law:

> "Whether the First Appellate Court was right in declaring the title of Mariyam Bai over the suit lands and in granting relief of possession to her on the basis of document Ex. P-1.?"

8. Shri Ali Asgar, learned counsel for the appellant has assailed the judgment of the First Appellate Court on the following grounds:

(a) Document Ex. P-1 is falsified by the fact that Mariyam Bai had in the year 1985 and 1986 while executing the registered sale deed of lands belonging to Kejaha, while describing herself as the widow of Kejaha.

(b) The certified copy of the order of partition of the agricultural lands belonging to Budhari in the year 1981 clearly goes to show that 15.26 acres of land had fallen to the share of Budhari. That being so, in the year, 1952, Budhari while executing Ex. P-1 could not have knowledge that only 15 acres of land would fall to his share.

(c) In the partition proceedings, a notice was also issued to Mariyam Bai vide Ex. D-14 wherein she was shown as widow of Kejaha.

(d) After death of Budhari, name of the defendants got mutated over the suit lands as per order of partition dated 21.8.1981 and they were recorded to be in continuous possession over the suit lands.

(e) There was no evidence to show that Mariyam Bai was ever in possession of the suit lands or was ever dispossessed.

(f) The Document Ex. P-1 being an unregistered document did not confer any title upon Mariyam Bai under Section 49 of the Registration Act.

(g) The material fact of execution of Ex. P-1 and the status of Mariam Bai being the wife of Budhari by Churi marriage was not pleaded.

(h) Mariyam Bai had failed to explain why she did not get her name mutated over the suit lands or why her possession was never recorded over the suit lands in Khasra Panchsala, if she was in possession of the suit lands from 1952 till 2000.

On these premises, it was urged that the judgment and decree passed by the First Appellate Court was perverse and liable to be set aside.

9. On the other hand, Shri Utkarsh Verma, argued that the document Ex. P-1, being only a memorandum of settlement between Budhari and Mariyam Bai, did not require any registration. Reliance was placed on *Ram Charan Das. Vs. Girja Nandini Devi and other* AIR 1966 SC 323, *Tek Bahadur Bhujil Vs. Debi Singh Bhujil and others* AIR 1966 S.C. 292 and *Kale and others Vs. Deputy Director of Consolidation and others* AIR 1976 S.C. 807 and *Kisto Chandra Mandal and others v. Mt. Anil Bala Dasi and others* AIR 1968 PATNA 487. It was urged that Churi marriage was prevalent in the community of the parties. According to customs prevalent, since time immemorial Mariyam Bai acquired the status of wife and title over the suit lands by virtue of the memorandum of settlement executed by Budhari in the year 1952 vide Ex.P-1. It was also argued that Mariyam Bai had in her affidavit para 4 clearly stated that she was in possession of the suit lands during life time of Budhari and after death of Budhari, the defendants had forcibly dispossessed her and got their names mutated over the suit lands. Her testimony was wholly un-rebutted in cross-examination. It was also pointed out that

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Harva PW/2 in para 4 of cross-examination stated that all the witnesses of documents Ex.P-1 except Giridhar had expired and the defendants had failed to examine Giridhar to rebut Ex.P-1. On these premises, while arguing in support of the impugned judgment, it was urged that the Second Appeal was liable to be dismissed.

10. Having considered the rival contentions, I have perused the record. I am of the considered opinion that the judgment and decree passed by the First Appellate Court is perverse and liable to be set aside. Both the Courts below before appreciating Ex. P-1, a document alleged to have been executed by Budhari in the year 1952 failed to notice that plaintiff Mariyam Bai did not plead that she acquired title over the suit lands by means of a document *"Churihai bihav aau Kharcha Parmani"* executed by Budhari in the year 1952. In the absence of pleadings, oral evidence relating to execution of document Ex. P-1 ought not to have been taken into consideration by the Courts below.

11. The suit was filed on 9.12.2000. The plaint only showed Mariyam Bai as the widow of Budhari in the cause title and nowhere in the pleadings, it was pleaded that Mariyam Bai was the wife of Budhari by Churi marriage and document "*Churihai bihav aau Kharcha*

*Parmani* Ex. P-1 had been executed by Budhari on 10.5.1952 in favour of Mariyam Bai. Thus, the plaintiff filed the suit showing herself in the cause title to be the widow of Budhari. Since the plaintiff had suppressed the aforesaid material fact of execution of P-1 by Budhari in the pleadings, the defendant had absolutely no knowledge of the aforesaid fact and in their written statement only pleaded that Mariyam Bai was the widow of Kejaha while Biriji Bai, the defendant No. 4 was the wife of deceased Budhari. In view of such pleadings, the learned Civil Judge, Class-I framed an issue No. 1 as to whether the plaintiff was married to Budhari? Thus, at no point of time, this fact had surfaced in the pleadings that Mariyam Bai was the wife of Budhari due to Churi marriage during subsistence of his earlier marriage with Biriji Bai. It is pertinent to note that the civil suit was fixed after three years for evidence on 22.8.2003 on which date, the plaintiff Mariyam Bai took the defendants by surprise by filing document Ex. P-1 along with her affidavit under Order 18 Rule 4 of the C.P.C. wherein she stated for the first time that there was a custom of Churi marriage prevalent in their community since time immemorial and although she was the legally married wife of Kejaha, she had, after death of Kejaha, married Budhari in the Churi form during subsistence of his marriage with Biriji Bai and had executed document Ex. P-1. It is thus, clear that the plaintiff did not come to

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the Court with clean hands and suppressed material facts which ought to have been pleaded by her in the plaint and thereby took the defendants by surprise by filing document Ex. P-1 along with her affidavit under Order 18 Rule 4 of C.P.C. There is no element of doubt that the fact of Churi marriage of Mariyam Bai with Budhari on 10.5.1952 vide Ex. P-1 was neither pleaded nor in issue. It was a material fact on which the entire case of the plaintiff rested or in other words, without pleading which the plaintiff could not succeed. Therefore, it was absolutely essential for the plaintiff to have pleaded the factum of Churi marriage and the execution of document Ex. P-1 by Budhari in relation to the suit lands on 10.5.1952.

12. In *Sopan Sukhdeo Sable and others Vs. Assistant Charity Commissioner & others*, (2004) 3 SCC 137, the Apex Court held as under:

> " Order 6 Rule 2 (1) CPC states the basic and cardinal rule of pleadings that every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.
>
> There is a distinction between "material facts" and "particulars". The words "material facts" show that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement or plaint becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as

to make the opposite party understand the case he will have to meet".

13. Bearing the above principle in mind, if the pleadings are construed as a whole there is complete lack of pleading of the material fact that Budhari had accepted Mariyam Bai as his wife on 10.5.1952 by Churi marriage and had given 5 acres of land to her for her maintenance. This fact was a material fact which ought to have been specifically pleaded by the plaintiff since her entire claim was based on this fact. In the absence of pleadings, both the Courts below fell into error in taking into consideration the evidence led by the plaintiff, oral as well as documentary in this regard. The lower court while considering the application for filing Ex. P-1 along with her affidavit under Order 18 Rule 4 C.P.C. ought to have adjudicated upon the proof and admissibility of the document as also the evidence in para 1 to 3 under the proviso to Rule (1) of Order 18 and rejected outright the statement of Mariyam Bai in paras 1, 2 and 3 as inadmissible for want of pleadings of material fact. In this view of the matter, the finding recorded by the First Appellate Court that Mariyam Bai had entered into Churi form of marriage with Budhari on 10.5.1952 and Budhari had given the suit lands to Mariyam Bai for her maintenance is clearly not sustainable in law.

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14. As regards the argument of Shri Utkarsh Verma learned counsel for the respondent/ plaintiff that the document Ex. P-1 is a memorandum of family settlement, it is well settled that the members who are parties to the family arrangement must have some antecedent title claim or interest, even a possible claim in the property which is acknowledged by the parties to the settlement. Admittedly, Mariyam Bai was the widow of Kejaha and had absolutely no semblance of title over the suit lands on the date of execution of Ex. P-1 which is also an acknowledgement of Churi marriage by Budhari with Mariyam Bai. Since the document Ex. P-1 is not a deed of relinquishment of its claim by Budhari over the suit lands, under the facts and circumstances of the case, an antecedent title of Mariyam Bai over the suit lands cannot be assumed and the document Ex. P-1 cannot be construed to be a memorandum of family settlement. For taking this view, I am fortified by the observation of the Apex Court in *Kale & others Vs. Deputy Director of Consolidation & others*, AIR 1976 S.C. 807, wherein the Apex Court has laid down the guidelines for construing a document as a family settlement as under:

> (1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;
>
> (2) The said settlement must be voluntary

and should not be induced by fraud, coercion or undue influence;

(3) The family arrangements may be even oral in which case no registration is necessary;

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immoveable properties and therefore does not fall within the mischief of Section 17 (2) (sic) (Sec. 17(1) (b)?) of the Registration Act and is therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.

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15. Thus, it is clear that since Mariyam Bai did not even have a semblance of title over the suit lands on the date of execution of Ex. P-1 evidencing Churi marriage also, the same cannot be construed to be a memorandum of family settlement. It is also pertinent to note that in her affidavit filed under Order 18 Rule 4 of the C.P.C. the plaintiff Mariyam Bai had in para 3 acknowledged the fact that document Ex. P-1 was executed at the time of her Churi marriage with Budhari. Under these circumstances, under Section 49 of the Registration Act, the document Ex. P-1, in the absence of Registration, could not confer any title to Mariyam Bai over the suit lands. It is also pertinent to note that the document Ex. P-1 is vague inasmuch as description of the suit land do not find place therein.

16. The First Appellate Court ignored the fact that Mariyam Bai was shown as the widow of Kejaha in the sale deed executed in the year 1976. It also failed to consider that Mariyam Bai had not given any reason for not getting her name mutated over the suit land or why her possession was not recorded over the suit lands at any point of time between 1952 till the year 2000. It also failed to notice that the above fact completely demolished the testimony of the plaintiff Mariyam Bai that she was dispossessed in the year 2000 by the defendants though unrebutted in cross examination (since the

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defendants were taken by surprise). It also failed to notice that Budhari would not have known in the year 1952 that only 15 acres of land would fall to his share because the shares actually got crystallized vide order dated 21.8.1981 passed by the Naib Tahsildar in Revenue Proceedings for partition. It ignored that in these proceedings the notice issued to Mariyam Bai also referred to her as the widow of Kejaha. It also failed to consider that at no point of time possession of Mariyam Bai was recorded over the suit lands from 1952 till the year 2000. Budhari was the recorded title holder and in possession over the suit land and after the aforesaid partition in 1981, the lands came to be recorded in the names of the defendants who were also shown to be in continuous possession thereof in the revenue records.

17. There is thus not even an iota of doubt that the judgment and decree of the first appellate Court granting relief of declaration of title and possession over the suit lands to Mariyam Bai on the basis of document Ex. P-1 is perverse being contrary to law and is liable to be set aside. Substantial question of law is therefore, answered in the negative.

18. As a result, the Second Appeal filed by the defendants is allowed. The judgment and decree passed by the First Appellate Court is set aside while affirming the judgment and decree passed by Civil Judge, Class-I in Civil Suit No. 89-A/2000. Costs of the Second Appeal shall be borne by the respondents/plaintiffs. Pleader's fee as per schedule if certified. A decree be drawn accordingly.

Sd/-
Dilip Raosaheb Deshmukh
Judge

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